No. 80-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS PERRY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the warrantless search of an automobile at the police station after petitioner's arrest and after an officer had driven the vehicle to the police station violated petitioner's Fourth Amendment rights:

a) Whether police officers after effecting petitioner's arrest and driving petitioner's vehicle to the police station may examine articles in the interior of the car without first obtaining a warrant.

b) Whether police who have a description of a suspect vehicle but who have not yet located the vehicle are required to obtain a John Doe search warrant on the supposition that the vehicle will be located during the period in which the warrant may be executed.

c) Whether police who have a description of a suspect vehicle, a method of operation, and a description of stolen articles who spot a vehicle matching the description, observe conduct indicative of the method of operation and see similar articles visible in the car's interior upon stopping the vehicle, have probable cause to arrest the occupant and search and seize the articles.

(2) Whether the trial court's refusal to hold a hearing on petitioner's challenge to the array of prospective jurors because of petitioner's procedural default violated petitioner's Sixth and Fourteenth Amendment rights.

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JURISDICTIONAL STATEMENT

Respondents admit jurisdiction under 28 U. S. C. § 1257(3) to all questions excepting that portion of Argument I pertaining to inventory search. Since petitioner failed to raise that question in the Illinois Appellate Court and it was not, therefore, considered by that Court, respondents contend this Court is without jurisdiction as regards that question. 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The petitioner adequately sets forth the constitutional provisions involved in this cause.

NATURE OF THE CASE

Three Illinois State University students were assaulted and robbed during the course of a home invasion on December 18, 1978, shortly after 1:00 a.m. (Tr. 216, 265-266, 272, 273) Because of darkness, only the perpetrators' coats and shoes could be identified by the victims. The victims' next door neighbor provided police with a description of a vehicle blocking his driveway when he arrived home at 1:00 a.m. or 1:30 the morning of December 18th. He informed police that he observed four individuals carrying items to the car. (Tr. 327) The suspect vehicle was observed by police at 4:24 p.m. on December 18. (Tr. 333) Officers later stopped the automobile and saw stereo equipment and speakers in the interior. (Tr. 43). The suspect vehicle was driven to the police station and when officers inventoried the amplifier found in the car they discovered its serial and model numbers matched the amplifier taken in the home invasion. (Tr. 44)

The defendant gave officers permission to search his dorm room (Tr. 46-47), where officers found one of the victims' class ring (Tr. 361) and shoes and jacket that matched the victims' description of their assailants. (Tr. 354)

Defendant was arrested approximately 17 hours after the home invasion was reported to police. (Tr. 53)

After a jury trial, defendant Dennis Perry was convicted for three counts of armed robbery, and one count each of home invasion, burglary, and felony theft. He was sentenced to 20 years for each armed robbery charge, 20 years for home invasion, 7 years for burglary, and 5 years for theft, all to run concurrently. From the judgments of conviction defendant appealed to the Illinois Appellate Court. After an affirmance, Perry petitioned the Illinois Supreme Court for leave to Appeal. Leave to Appeal was denied. Perry now petitions this Court for a Writ of Certiorari.

STATEMENT OF FACTS

Search Of Petitioner's Car At Police Station After Petitioner's Arrest

At 1:00 a.m. on December 18, 1978, Ronald Sobkoviak, a student at Illinois State University, went downstairs to bed in a bi-level he occupied with four other students at 216 S. Coolidge in Normal, Illinois. (Tr. 216) Two other occupants were also home asleep when the doorbell rang at 1:20—1:30. Mr. Sobkoviak went to the door and encountered a thin black man, who wore a green army fatigue jacket. He asked for "Dan." (Tr. 23)

Mr. Sobkoviak went to tell his roommate, Daniel Hick, that there was a man looking for him and returned to his room. (Tr. 231) Mr. Hick went to the door. (Tr. 260) When he opened the door, the man drew a gun and forced entry. (Tr. 261) Several other individuals also entered. (Tr. 262)

Mr. Hick was forced down the stairs. One man got on top of him (Tr. 263), held a knife to his back and threatened to cut him. (Tr. 265, 266) When Ronald Sobkoviak heard the scuffle he walked out of his room and saw a black man with a gun. He was not as tall or as slim as the man who had rung the doorbell, but because it was fairly dark Mr. Sobkoviak could not see any of his features.

The man ordered Mr. Sobkoviak back to his room, where he pushed him into bed and told Sobkoviak he was going to kill him. (Tr. 234) Daniel Hick was brought into Sobkoviak's bedroom. (Tr. 265) Mr. Hick was cut in the neck and his face was slammed into the floor with enough force to break two bottom teeth. (Tr. 267)

The other roommate present that evening, Greg Burmeister, was brought to Sobkoviak's bedroom by gunpoint and told to lie flat on his face. (Tr. 235)

Next, the man on top of Sobkoviak asked for his wallet and took the cash. (Tr. 236) Sobkoviak heard people in the other bedrooms and a noise like the rooms were being ransacked. (Tr. 238)

The men ordered the roommates to crawl to Dan's room. (Tr. 238) When the man concluded that they could not force the roommates to crawl under the waterbed, they ordered the roommates to crawl into Greg's room. (Tr. 239) Dan was thrown into the closet and Greg and Ron were forced under the bed. (Tr. 241)

At one point, the intruders turned on the lights for two to three minutes. (Tr. 242) From beneath the bed, Sobkoviak could see three pairs of shoes: a pair of blue tennis shoes with white slanted stripes, a pair of high-heeled black dress shoes with rounded, square toes, and a pair of hiking boots with thick shoelaces. (Tr. 241-242)

Greg also noticed that one man was wearing blue tennis shoes with white stripes (Tr. 302) and identified an army fatigue jacket as similar to the coat one of the intruders wore. (Tr. 304)

The intruders left the room, leaving a man to stand guard. Sobkoviak heard noises like the house was being ransacked. The intruders discussed whether to kill the roommates. Then, nothing was heard. (Tr. 243) Approximately 15 or 20 minutes elapsed from the time the intruders arrived, threatened, beat, cut, held at gunpoint and robbed the roommates to the time when the intruders left. (Tr. 244)

Sobkoviak went to his room and found that it, like the other rooms, was in shambles. (Tr. 244) Besides the cash taken from his wallet, he was also missing his checkbook. (Tr. 245) Mr. Flock was missing a Pioneer stereo amplifier, a McDonald clock and some silver dollars. (Tr. 272) He was to see those items the following day at the police station. Other items, such as a ring and necklace, he never saw again. (Tr. 273) Greg Burmeister testified that his amplifier in the living room was

missing. At the police station the following day he was to recover a class ring, belts, and a clock. (Tr. 307)

Martin Belz was the victim's next-door neighbor. He testified that when he came home around 1:00 or 1:30 a.m. the morning of December 18, 1978, an automobile was blocking his driveway. (Tr. 373) It was approximately a 1970 two door Buick, yellow with a black vinyl top, with amber headlight covers and a "lot of things" hanging from the rearview mirror. (Tr. 324) Later that morning, Mr. Belz heard his dogs bark and he looked out the window. He observed four individuals carrying items to the Buick. (Tr. 326) At 9:30 a.m. Mr. Belz notified police of his observations. (Tr. 327) A description of the car was put out to all local police departments. (Tr. 13)

A campus police officer spotted a suspect vehicle that matched the description at 4:24 p.m. outside the Waterson Towers domitory. The car was a 1968 yellow Buick, with a black vinyl top, amber headlight covers and a white tassel hanging on the rearview mirror. (Tr. 333) He radioed the police who sent two officers to observe the car. (Tr. 343) They observed a black male get into the car and pull it in front of Waterson Towers. Two other black males helped the defendant load items into the back and trunk of the car. (Tr. 23) Two subjects got into the car and pulled away. (Tr. 344) The officers followed (Tr. 344) and stopped the car near Beaufort and Vernon. Defendant was driver of the car. (Tr. 345)

Defendant left the stopped automobile and walked towards the squad car. He and his passenger, Maxine Mors, were patted down and handcuffed. The officers checked the interior of the car and found stereo equipment and speakers. Miscellaneous items were in the trunk. An officer drove the suspect vehicle to the police station. (Tr. 43) The officers inventoried the Pioneer amplifier found in the automobile and discovered it had the serial and model numbers of the amplifier taken in the home invasion. (Tr. 44)

Defendant was read his *Miranda* rights. (Tr. 349-350) He explained that a man named Bob at Hillside Apartments had asked him if he wanted to buy an amplifier and class ring. The officers asked defendant if he would let them search his dorm room. He gave the officers permission. (Tr. 46-47)

The dorm room was searched and officers found the class ring. (Tr. 361) They also recovered a green army fatigue jacket and pair of blue and white tennis shoes. (Tr. 354)

Defendant was arrested approximately 17 hours after the home invasion was reported to the police department. (Tr. 53)

At trial defendant testified that he had spent the entire evening in question with his girlfriend, Pamela Pharms, in her dorm room. (Tr. 379-380) He stated that the amplifier and class ring were purchased from a man named "Bob" in a parking lot for $60. (Tr. 384-385) He had borrowed the car from a friend to use while moving between dormitories. (Tr. 386, 387)

Jury Selection

Prior to trial, defense counsel challenged the jury array on the grounds that it appeared Illinois State University students were excluded from the venire. (Tr. 99) The trial court noted that the motion was made orally and that it was the court's understanding that "such a motion is appropriately made in writing supported by an affidavit and burden of proof."

The court stated that it believed it could be concluded upon examination of the list of prospective jurors whether there were any students from the university who made up the jury pool and whether it would be a proper challenge to the array. The court denied the motion. (Tr. 100)

Voir dire was held and the jurors were sworn. (Tr. 101-196)

I.

CERTIORARI SHOULD BE DENIED BECAUSE DECISIONS OF THIS COURT CLEARLY ESTABLISH THAT THE FAILURE OF THE OFFICERS TO OBTAIN A SEARCH WARRANT PRIOR TO EXAMINING A STEREO AMPLIFIER WHICH WAS ON THE FRONT SEAT OF THE AUTOMOBILE PETITIONER HAD BEEN DRIVING PRIOR TO HIS ARREST DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS.

On December 18, 1978, shortly after 1:00 a.m. several students at Illinois State University were awakened from their beds and subjected to a brutal and terrifying home invasion. During the course of the home invasion, one student was held facedown at gunpoint and his life threatened; another student was held facedown with a knife held to his back, threatened, cut and had two teeth broken. The perpetrators of these crimes removed many articles from the apartment, including jewelry, money and stereo equipment. Due to the dark conditions, however, the students were unable to describe their assailants to the police, except to state that the assailants were black and that one wore blue tennis shoes with white-slanted stripes, another wore high-heeled black dress shoes with rounded, square toes and the third wore a pair of hiking boots with thick shoelaces.

A next-door neighbor, Martin Belz, notified the police at 9:30 a.m. on December 18, 1978 that he had observed an automobile blocking his driveway shortly after 1:00 a.m. Sometime later Mr. Belz's dogs had barked; he had looked out the window and observed four (4) individuals carrying items to the automobile. Mr. Belz described the automobile to police as approximately a 1970 Buick, two door, yellow with a black vinyl top, amber headlight covers and a "lot of things" hanging from the rearview mirror. A description of the car was put out to all local police departments.

At 4:24 p.m. campus police spotted a 1968 yellow Buick, black vinyl top, amber headlight covers and a white tassle hanging on the rearview mirror. The vehicle was parked outside a college dormitory. The campus police radioed city police who sent two officers to observe the car. They observed a black male get into the car and pull it in front of the dormitory. Two other black males helped petitioner load items into the car. The three got into the car and drove away. The officers then stopped the vehicle. Petitioner was the driver. Petitioner and a passenger were arrested and transported to the police station. The officers observed stereo equipment in the interior of the car. An officer drove the suspect's vehicle (i.e. the 1968 yellow-black Buick) to the police station. Once at the police station the officers discovered that the serial and model numbers of the amplifier located on the front seat of the suspect vehicle matched the numbers of the amplifier taken in the home invasion.

Petitioner seeks certiorari upon an alleged Fourth Amendment violation involving the failure of the officers to obtain a search warrant prior to searching petitioner's automobile. Petitioner's contentions are: (1) that since 7½ hours elapsed between the time police were given a description of the car and the time the car was stopped, the officers had ample time to obtain a search warrant for the car; (2) that the officers had no reasonable grounds to believe that the car contained stolen goods, contraband or evidence of a crime and, therefore, had no authority to conduct a warrantless search of the automobile; (3) the officers did not have sufficient probable cause to effect petitioner's arrest; (4) since the search of the automobile occurred after petitioner had arrived at the police station, the search could not be justified as incident to arrest; (5) the warrantless search of the automobile cannot be justified as an inventory search. For all the reasons hereinafter stated, certiorari should be denied.

The Warrantless Search Of the Vehicle At The Police Station Was Proper

The factual situation and issues raised in this case bear striking similarity to *Chambers* v. *Maroney,* 399 U. S. 42 (1970). In *Chambers* a description of a vehicle in which robbers had escaped the scene was broadcast over the police radio. Shortly thereafter, officers encountered a vehicle fitting the description of the escape vehicle. They arrested the driver and its passengers and took the automobile to the police station. The car was searched and evidence of the robbery was discovered concealed in a compartment beneath the dashboard. In sustaining the warrantless seizure of the vehicle and its subsequent warrantless search, this Court said:

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater". But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend upon a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. 399 U. S. at 51-52.

Hence, the issue upon which petitioner seeks certiorari, that is, whether the officers should have delayed the search of petitioner's vehicle at the police station and after petitioner's arrest until they had obtained a warrant was settled in *Chambers* v. *Maroney, supra. See also Texas* v. *White,* 423 U.S. 67 (1975) (probable cause factor developed at the scene still obtains at the station house), *Carroll* v. *U.S.,* 267 U.S. 132 (1925).

In a related contention petitioner contends that since 7 1/2 hours elapsed between the time the police learned the descrip-

tion of the suspect vehicle from Belz and the time they actually spotted the vehicle, the police had ample time to and should have obtained a search warrant for the car. (Petition, 30-31). Petitioner attempts to liken these facts to *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971) in support of the contention that police officers in such situations should be required to obtain warrants. Respondents contend that certiorari should be denied because *Coolidge* is distinguishable and the argument is otherwise without merit.

In *U.S.* v. *Blanton,* 520 F. 2d 907 (6th Cir. 1975) the Sixth Circuit Court of Appeals considered a similar argument. In that case defendant Blanton argued that since the FBI knew a week in advance that the car could contain contraband, they should have obtained a search warrant prior to the time they actually spotted the car. The Sixth Circuit distinguished *Coolidge* on the grounds that in *Coolidge* the officers had known the location of the car to be searched for several days, they had no reason to believe Coolidge's car would be moved to another jurisdiction, and had no reason to believe the car contained contraband. Substantively, the Court held that since the car had not been located in any particular spot the FBI agents could not be required to obtain a warrant, good only for a short time, on the chance that the car could be located within that period. Respondents submit that the Sixth Circuit's decision distinguishing *Coolidge* and refusing to require officers to obtain warrants on vehicles until the officers have at least located or observed the vehicle is correct, that petitioner's argument is without merit and that certiorari thereupon should be denied.

Additionally, petitioner contends that the officers lacked probable cause to arrest petitioner and lacked probable cause to believe that the car contained stolen goods, contraband or evidence of crime. As to the requisites of probable cause, this Court has stated:

> Probable cause exists where the facts and circumstances within [the officer's] knowledge and of which they have

> reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar* v. *U.S.*, 338 U. S. 160, 175 (1949) *citing Carroll* v. *U.S., supra.*

The arresting officers in this case, by this definition were certainly aware of sufficient facts and circumstances both to arrest petitioner and to believe that the stereo equipment visible in the car's interior was probably stolen. At the time of the arrest the officers had a description of the vehicle involved in the home invasion. The vehicle petitioner was driving matched that description. Mr. Belz, the next door neighbor had reported seeing 4 black males carrying articles from the students' apartment to the car during the home invasion. The officers observed 3 black males carrying articles from a college dormitory to a car matching the description of the home invasion suspect vehicle, loading the articles and driving away. Upon stopping the vehicle they observed stereo equipment in the car, and, specifically, an amplifier in the front seat. One of the victims of the home invasion had reported the loss of an amplifier. Hence, from the facts concerning the home invasion—the description of the suspect vehicle, number of participants, the method of operation and the target victims as students, and the nature of the property stolen—the arresting officers could reasonably believe that petitioner and his passengers were involved in the home invasion and that the amplifier in the front seat was fruit or evidence of a crime. *Colorado* v. *Bannister,* ____ U. S. ____, 101 S. Ct. 43 (1980), recently decided by this Court, so held. In *Bannister,* a police officer heard by radio dispatch that a theft of motor vehicle parts had occurred. The dispatch indicated that a number of chrome lug nuts were among the items stolen and described the two suspects. The officer had earlier observed a blue 1967 Pontiac GTO travelling at a speed above the legal limit but had lost sight of it. He saw the vehicle again, still speeding, and stopped it in order to issue a citation. As the officer approached, the

occupants got out of the car. A conversation ensued. During the conversation, the officer observed chrome lug nuts as well as two lug wrenches inside the car. Recognizing that the occupants met the description of the suspects in the recent theft of motor vehicle parts, the officer immediately arrested both occupants and seized the lug nuts and wrenches. This Court held that under these facts the officer had sufficient probable cause not only to effect the arrest, but, under *Carroll* and *Chambers,* probable cause to seize the incriminating items from the vehicle without a warrant. *Id* at 44. Respondents submit that petitioner's contentions regarding the officers' probable cause or lack thereof in the instant case were settled in *Colorado* v. *Bannister, supra* and that, therefore, certiorari thereupon should be denied.

Inventory Search

Petitioner also contends that the warrantless search of petitioner's vehicle after petitioner's arrest and after a police officer had driven the vehicle to the police station cannot be justified as an inventory because the officers were not inventorying the contents of the vehicle, but rather were continuing to pursue a criminal investigation. Respondents have examined the brief of both parties submitted to the Illinois Appellate Court and the Illinois Appellate Court's opinion (Petition, A-2-A-27) and submit that the question whether the search was sustainable as an inventory search was neither argued in the briefs nor raised *sua sponte* by the Illinois Appellate Court. The United States Supreme Court cannot decide issues raised for the first time on review of a state court decision. *Tacon* v. *Arizona,* 410 U. S. 351 (1973), *Hill* v. *California,* 401 U. S. 797 (1971), *Cardinale* v. *Lousiana,* 394 U. S. 437 (1969). Since petitioner did not raise and the Illinois Appellate Court did not consider, the question whether the search was sustainable as an inventory search under *South Dakota* v. *Opperman,* 428 U. S. 364 (1976), respondents contest jurisdiction under 28 U. S. C. § 1257(3) and contend that certiorari must be denied.

II.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER'S PROCEDURAL DEFAULT CONSTITUTES AN ADEQUATE AND INDEPENDENT GROUND OF DECISION BARRING REVIEW BY THIS COURT.

Petitioner alleges that his Sixth and Fourteenth Amendment rights to a jury chosen from a fair cross-section of the community, *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), were violated when the trial court refused a hearing on petitioner's challenge to the array of prospective jurors from which college students had been excluded. The trial court grounded its decision on petitioner's procedural default, that is, upon the fact that Illinois law requires that motions challenging the jury array be in writing, supported by affidavit and shall state facts which show that the jury panel was improperly selected or drawn. *Ill. Rev. Stat.*, ch. 38, § 114-3(b) (1978). On review, the Illinois Appellate Court agreed with the trial court's assessment of the law and held that due to the procedural default, the trial court properly refused to conduct a hearing on the motion. (Petition, A-17).

In *Henry* v. *Mississippi*, 379 U. S. 443 (1965) this Court held that failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in the Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule. Petitioner thus asserts that the State of Illinois has no legitimate state interest in requiring the motion to be in writing and accompanied by affidavits which state facts showing that the jury panel was improperly selected or drawn. Respondents disagree. The procedural requirement of a written motion with supporting affidavits on motions challenging the jury array serves a legitimate state interest. States undoubtedly have a legitimate interest in the orderly administration of their processes of criminal justice which includes expeditious handling of criminal cases and considerations of judicial economy. On a

motion challenging the jury array, the defendant, in order to establish a prima facie violation of the fair cross-section requirement, must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. *Duren* v. *Missouri*, 439 U. S. 357 (1979), *Michigan* v. *Tyler*, 436 U. S. 499 (1978). Respondents contend that the nature of the proof required to establish the prima facie showing of a violation in itself justifies the requirement that the motion be written and documented with factual affidavits. A trial court cannot be expected to determine whether the prima facie violation has been established based solely upon counsel's bare oral allegations. Additionally, respondents point out that petitioner in this instance has failed to offer any explanation whatsoever as to why the venire list was unavailable prior to the commencement of jury selection, how trial counsel was able to determine from merely looking at the list of names that none of the persons in the venire were students and why the petitioner could not and did not comply with procedural requirements. The state has a legitimate interest in requiring that a motion challenging the composition of the jury array be in writing and accompanied by affidavits which state facts showing that the jury panel was improperly selected or drawn. Irrespective of the merit or lack thereof in petitioner's claim, petitioner's procedural default on this question constitutes an adequate and independent ground of decision that bars review by this Court. For all these reasons respondents request that certiorari on this issue be denied.

CONCLUSION

For all the reasons herein stated respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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